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Hon. Susan R. Ryan, Water Referee
District Court, Water Division 5

**Re: Response to Summary of Consultation dated August 28, 2018
Southeastern Colorado Water Conservancy District
Case No. 18CW3063**

Dear Referee Ryan:

The Applicant, Southeastern Colorado Water Conservancy District (Southeastern), by and through its attorneys, provides the following Response to the Consultation Report of the Division Engineer, filed with the Court on August 28, 2018. This response provides an overview of the Fryingpan-Arkansas Project (Project) and then addresses the specific issues identified in the Division Engineer's Report. Attached as **Exhibit A** supporting this response is a preliminary engineering report by Wilson Water Group (WWG) that describes the Project; the basis for the partial absolute claim;¹ and ongoing efforts and study on Project operations and yield as further discussed below.

Fryingpan-Arkansas Project

The Project is a \$550 million, federally-approved transmountain water diversion that supplies Southeastern Colorado with water for irrigation, domestic, municipal, power, manufacturing, recreational, and other beneficial purposes.² The Project purposes also include flood control on the Arkansas River, recreation, and fish and wildlife conservation.³

The Project has numerous features that work together to divert water from the Colorado River Basin (the Fryingpan and Roaring Fork River drainages) into the Arkansas River Basin, and to divert and store water from the Arkansas River and its tributaries, for storage and delivery in the Arkansas Valley. All Project features required to divert, convey, and store water on both the East and West slopes were designed as part of a single water supply system to supply water

¹ Preliminary Engineering Report dated November 14, 2018, Case No. 18CW3063 at 29.

² Pub. L 87-590, 76 Stat. 389, pp. 389-93 (Aug. 16, 1962).

³ *Id.*

for beneficial use in parts of nine counties in the Arkansas Valley that are within Southeastern's boundaries.⁴

The Project collects water on the West Slope (primarily runoff from melting snow) through a series of canals and tunnels. There are two systems for collecting water on the West Slope. The North Side Collection System intercepts runoff from north tributaries of the Fryingpan River from Lime Creek to the mainstem of the Fryingpan River. Diversion and conveyance structures on Lime Creek and Last Chance Creek remain unbuilt, as do several intercepts in the Fryingpan River drainage.⁵ The South Side Collection System intercepts runoff from the south tributaries of the Fryingpan River and the Hunter Creek drainage. The South Side Collection System has been fully constructed. Water diverted from the South Side Collection System joins water from the North Side Collection System to pass through the Boustead Tunnel, across the Continental Divide, and into Turquoise Lake and Twin Lakes Reservoirs on the Eastern Slope.⁶

Southeastern is a quasi-municipal corporation that was formed in 1958 to develop and administer the Project. Southeastern is a governmental agency as that term is defined by C.R.S. § 37-95-103(5)(b). Southeastern holds the water rights to the Project. Southeastern adjudicated the water rights for the Project in four separate cases (collectively "Project Decrees").⁷ The collection, transportation, storage, and power systems of the Project described in the Project Decrees comprise one overall water supply project. The water diverted by Project features for Project purposes is collectively known as "Project Water."

⁴ *Id.*

⁵ Revised Findings of Fact, Conclusions of Law, Ruling of the Referee and Decree of the Water Court, *Concerning the Application of the Southeastern Colorado Water Conservancy District for Finding of Reasonable Diligence on Conditional Water Rights of the Fryingpan-Arkansas Project in Eagle and Pitkin Counties, Colorado*, District Court, Water Division 5, Case No. 09CW40 (May 28, 2012); Application for Finding of Reasonable Diligence and to Make Conditional Rights Absolute for the Fryingpan-Arkansas Project, *Concerning the Application for Water Rights of Southeastern Colorado Water Conservancy District for the Fryingpan-Arkansas Project in Eagle and Pitkin Counties, Colorado*, District Court, Water Division 5, Case No. 18CW3063 (May 24, 2018).

⁶ *Id.*

⁷ Finding and Decree, *In the Matter of Adjudication of Priorities to the Right to the Use of Water for Irrigation and Nonirrigation Purposes in Water District #14, Water Division #2*, District Court, Pueblo County, Case No. B-42135 (June 25, 1962); Finding and Decree, *In the Matter of Adjudication of Priorities of the Right to the Use of Water for Irrigation and Non-Irrigation Purposes in Water District No. 11, Water Division No. 2*, District Court, Chaffee County, Case No. 5141 (July 9, 1969); Decree, *In the Matter of the Supplemental Adjudication of the Priority Appropriation of Water for all Beneficial Purposes, in Water District No. 38, In the State of Colorado*, Robert L. Bridges, Executor of the Estate of Tucker McClure, Deceased, and M. Stanley Pings, District Court, Garfield County, Case No. CA-4613 (June 20, 1958); and Ruling of Referee, *In the Matter of the Application for Water Rights of Southeastern Colorado Water Conservancy District in Pitkin and Eagle Counties*, District Court, Water Division No. 5, Case No. 83CW352 (April 30, 1985).

The Project's Division 5 water rights were originally adjudicated by Supplemental Decree in C.A. 4613 (Garfield County District Court, 1958). Most of the Project's Division 5 water rights have been placed to beneficial use and have been decreed absolute. The remaining Conditional Rights include structures that have yet to be constructed, and three others that had not been used to their full capacity before the previous diligence application in 2009.

Project operations are governed by the federal authorizing legislation for the Project and the Project's Operating Principles.⁸ Both East and West Slope interests negotiated and agreed to the Operating Principles, which were signed by Southeastern, the Colorado Water Conservation Board (CWCB), the Colorado River Water Conservation District, and the Southwestern Water Conservation District. The Operating Principles set forth the maximum amounts of water that the Project may divert from the West Slope, providing that the waters available under the decrees for the Project and the Basalt Project are to be allocated in a specified sequence.⁹ In particular, Operating Principle 9(1)(a) provides that the first allocation is for the Project's transmountain diversion to the Arkansas Valley, up to a maximum of 120,000 acre-feet in any one water year, or 69,200 acre-feet annual average over a continuous 34-year period. The second allocation is to Ruedi Reservoir, and the third is for 3,000 acre-feet to the Twin Lakes Exchange.

Southeastern obtained a decree in 1979 changing these rights based on the as-built collection system, and incorporating the Project's authorized yield from the Operating Principles. The Decree in Case No. W-829-76 (District Court, Water Division 5) entered November 27, 1979 ("1979 Decree") modified the Supplemental Decree in Case No. 4613. The descriptions of certain West Slope Project features were changed to match as-built capacity and locations. The Decree also confirmed the Operating Principles' authorization for the decreed diversions to Eastern Colorado, subject to the annual and 34-year volumetric limits in the Operating Principles, and to certain bypass flows required by the Operating Principles and by a 1978 Agreement (incorporated in the Decree) between Southeastern, the State of Colorado, CWCB, Aspen, and Pitkin County; "plus an additional" 3,000 acre-feet for Project transmountain diversions for exchange with Twin Lakes Canal Company.¹⁰ The Conditional Rights are vital features of the Project and, when made absolute, will enhance the District's ability to realize the authorized yield of the project.

The Fryingpan-Arkansas Project Final Environmental Statement ("FEIS") addressed the deferred Last Chance and Lime Creek diversions.¹¹ As described in the FEIS, the structures,

⁸ Operating Principles, Fryingpan-Arkansas Project, House Document No. 130 (Adopted Apr. 30, 1959, as amended Dec. 30, 1959, and Dec. 9, 1960).

⁹ *Id.* ¶ 9(1)(a)-(d).

¹⁰ Memorandum Opinion and Decree, *In the Matter of the Application for Water Rights of Fryingpan-Arkansas Project in Eagle and Pitkin Counties*, District Court, Water Division 5, Case No. W-829-76 (Nov. 27, 1979) at 3.

¹¹ Bureau of Reclamation, 1975 Final Environmental Impact Statement (April 16, 1975) at IX-39.

which were “deferred indefinitely,” would have included “a tunnel from Carter Creek to Last Chance Creek, open intercept canals constructed on a contour to deliver intercepted water to the tunnel portals and an open intercept canal from Last Chance Creek to Lime Creek.”¹² The FEIS noted that the remainder of the North Side Collection System has been designed with sufficient capacity to convey water from Lime Creek and Last Chance to the Boustead Tunnel to prevent further environmental disturbance of the area should it become necessary to construct the Lime Creek and Last Chance Creek diversion facilities.¹³ The FEIS concluded that updated hydrologic data indicated that allowable diversions likely could be obtained without these features.¹⁴ However, the District has retained the conditional water rights from these sources should it become necessary to construct these facilities to obtain allowable transmountain water diversions.¹⁵ Accordingly, the 1979 Decree recognized that construction of the Lime Creek, Last Chance, and Intercept Canal diversions “has been held in abeyance” due to the updated hydrological data, pending “actual operation” of the Project to “determine whether or not construction of these features will become necessary.”¹⁶ The 1979 Decree also recognized that the entire project is a multiple-purpose unit, and that the Collection System is a unit for diligence purposes.¹⁷ In particular, the design and operation of the Collection System is integrated and coordinated toward achieving the objective of diverting the Project yield amounts authorized by the Operating Principles.

Southeastern contracts with the United States Department of Interior Bureau of Reclamation (Reclamation) for the construction, operation, and maintenance of the Project.¹⁸ In coordination with Reclamation, Southeastern supplies Project Water to constituents within its nine-county district for irrigation and municipal purposes, and repays Project costs. To do so, Southeastern annually allocates the available water yield from the Fryingpan-Arkansas Project (Project Water) to agricultural and municipal entities within District boundaries.¹⁹ Annual

¹² *Id.*

¹³ *Id.* at IX-39-40.

¹⁴ *Id.* at IX-39.

¹⁵ *Id.*

¹⁶ Memorandum Opinion and Decree, *In the Matter of the Application for Water Rights of Fryingpan-Arkansas Project in Eagle and Pitkin Counties*, District Court, Water Division 5, Case No. W-829-76 (Nov. 27, 1979) at 16, ¶ III.B.

¹⁷ *Id.* at 3, ¶G.

¹⁸ Contract No. 5-07-70-W0086, between the Southeastern Colorado Water Conservancy District and the United States Bureau of Reclamation, as amended (Repayment Contract); Pub. L 87-590 at 391, § 3.

¹⁹ Southeastern Colorado Water Conservancy District, Allocation Principles, Findings, Determinations, and Resolutions, as amended November 29, 1979, and confirmed by the Judgment and Decree, *In the Matter of*

requests for Project Water allocations exceed available supply in most years, so there is a need for additional Project Water when the Conditional Rights can supply it.²⁰

Response to Issues in Consultation Report

Issue 1: Applicant must provide more detailed evidence regarding the instantaneous diversion rates relied upon to make additional amounts absolute. Applicant should provide the charts or the data logger records that illustrate that the instantaneous diversion rates were as stated in the application.

Response to Issue 1:

Southeastern has applied for absolute decrees for an additional one (1) cfs from the No Name Creek diversion, and an additional five (5) cfs absolute from the Fryingpan River and Marten Creek diversion. Because these requested amounts have been diverted in priority, appropriated, transported to the East Slope, and applied to beneficial use under the conditional decree, at the two decreed points of diversion, Southeastern has requested absolute rights for the decreed beneficial purposes, with an appropriation date of July 29, 1957.

WWG reviewed diversion records in support of this absolute claim. The diversion records showed, and Erin Wilson of WWG confirms in her opinions, that: (1) 86 cfs has been diverted under the No Name Creek and Unnamed Tributary water right and that total amount should be made absolute; and (2) 400 cfs has been diverted under the Fryingpan River and Marten Creek water right and that total amount should be made absolute.²¹

WWG requested that the Bureau of Reclamation provide charts or data logger records that further support the instantaneous diversion rates that were stated in the application. WWG has provided this information in Appendix A to the attached **Exhibit A**, and provided the data to Mr. Martellaro on October 30, 2018.

Issue 2: Applicant must prove that the subject water rights “can and will” be beneficially used within a reasonable time and that applicant is not speculating in priorities CRS 37-92-305(9)(b); CRS 37-92-103(a)(I). The applicant must provide a specific plan to develop the subject water rights within a reasonable amount of time.

Southeastern Colorado Water Conservancy District, District Court, Pueblo County, Case No. C.A. 40487 (December 18, 1979).

²⁰ See *Southeastern Colorado Water Conservancy District*, 2010-2014 Water Conservation and Management Plan, (2010-2014 Water Conservation and Management Plan) at 7.

²¹ Preliminary Engineering Report dated November 14, 2018, Case No. 18CW3063 at 8 & 29, and Appendix A (contains diversion records).

Response to Issue 2:

A. Legal Standards

A conditional water right reserves a priority obtained through a water court decree, as long as the holder diligently develops the water right.²² A conditional water right allows an applicant to complete financing, engineering, and construction with the assurance that if the plan succeeds, it will be able to obtain an absolute water right.²³ In order to demonstrate reasonable diligence, an applicant must show that it “can and will” complete the project, in addition to proving that it has pursued the project with reasonable diligence.²⁴ In applying these requirements, the “can and will” and diligence statutes “must be read together.”²⁵ The applicant must appear before the court to demonstrate that it has completed sufficient work to prove that it is moving toward completion of the project.²⁶ If the applicant fails to make this showing, then the conditional right is speculative and violates the anti-speculation doctrine.²⁷ The anti-speculation and can and will doctrines are closely related, although the can and will requirement is “slightly more stringent.”²⁸ In *Municipal Subdistrict, Northern Colorado Water Conservancy District v. OXY USA, Inc.*, the Division 5 Water Court found that the applicant, OXY, had adequately shown diligence, and the Supreme Court held that the Water Court had adequately and properly considered can and will and anti-speculation in making this finding.²⁹

Southeastern is a quasi-municipal corporation that was formed in 1958 to develop and administer the Project.³⁰ To ensure no speculation, a governmental water supply agency must plan to use water within its service area and show it plans to use the changed water rights to satisfy a projected normal increase in population within a reasonable planning period.³¹

²² *Mun. Subdistrict, N. Colorado Water Conservancy Dist. v. OXY USA, Inc.*, 990 P.2d 701, 705–06 (Colo. 1999).

²³ *Id.* at 708.

²⁴ *Id.* at 707.

²⁵ *Id.*

²⁶ *Id.* at 708.

²⁷ *Id.*

²⁸ *Id.* at 708.

²⁹ *Id.* at 704–05.

³⁰ *In the Matter of Southeastern Colorado Water Conservancy District*, District Court, Pueblo County, Case No. C.A. 40487 (April 29, 1958).

³¹ *Pagosa Area Water & Sanitation Dist. v. Trout Unlimited*, 170 P.3d 307, 309-10, 315 (Colo. 2007).

An applicant must show that the water rights can and will be placed to beneficial use within a reasonable time.³² The “can and will” test is a balancing test of whether evidence of factors supporting the substantial probability of future completion is sufficient to outweigh the presence of future contingencies.³³ This balancing test involves multiple factors, including: the legal and physical availability of water, technical and economic feasibility, the applicant’s present right and prospective ability to access any property necessary to place the water rights to beneficial use, and the applicant’s ability to obtain necessary permits for construction.³⁴ While the “can and will” and diligence statutes should be read together,³⁵ the Colorado Supreme Court has provided little guidance on the interaction of the “can and will” inquiry with other related inquiries in diligence applications, such as the anti-speculation doctrine (including its government agency exception) and the “integrated system” approach.³⁶

B. The Conditional Rights are not speculative; they can be used to help satisfy a projected normal increased demand for water within Southeastern’s boundaries.

The remaining conditional water rights from those originally decreed for the Project in Civil Action No. 4613 on August 3, 1959, *nunc pro tunc* June 20, 1958³⁷ (Conditional Rights) are vital features of the Project and, when made absolute, will enhance the District’s ability to realize the authorized yield of the project, by which the District supplies supplemental water to over 700,000 people, and to irrigate over 250,000 acres in southeastern Colorado.³⁸ The Conditional Rights will be used to satisfy both projected population growth within a reasonable planning period and clean water needs of the Lower Arkansas Valley. The Conditional Rights are essential to the Project and, once absolute, will increase the District’s ability to realize the authorized yield of the Project. This, in turn, will help Southeastern to meet the needs of the growing population within its district boundaries.

³² See *Vermillion Ranch*, 307 P.3d, 1066-67 (Colo. 2013).

³³ See C.R.S. § 37-92-305(9)(b); *Vermillion Ranch*, 307 P.3d at 1066-67.

³⁴ *Vermillion Ranch*, 307 P.3d at 1066-67.

³⁵ See *OXY*, 990 P.2d at 707.

³⁶ See *Pagosa*, 170 P.3d 307 at 316-17 (The anti-speculation doctrine and “can and will” inquiry are closely related).

³⁷ Decree, *In the Matter of the Supplemental Adjudication of the Priority Appropriation of Water for all Beneficial Purposes, in Water District No. 38, In the State of Colorado, Robert L. Bridges, Executor of the Estate of Tucker McClure, Deceased, and M. Stanley Pings*, District Court, Garfield County, Case No. CA-4613 (June 20, 1958).

³⁸ See, e.g., U.S. Bureau of Reclamation Annual Budget Justification, Fiscal Year 2019, PDF at GP-30, (PDF at 359) (Project Water provides “an average annual supplemental water supply of 69,200 acre-feet (af) for irrigation of 280,600 acres in the Arkansas Valley and an annual supply of 41,000 af of water for use in several eastern slope municipalities.”).

1. Southeastern's constituents currently have an unsatisfied demand for clean water that the Conditional Rights can be used to satisfy.

Southeastern annually allocates the available water yield from Project Water to agricultural and municipal entities within District boundaries.³⁹ Annual requests for Project Water allocations exceed available supply in most years, so there is a need for additional Project Water when the Conditional Rights can supply it.⁴⁰ Erin Wilson of WWG confirms that “use of the Fryingpan-Arkansas Project Water as a supplemental source to senior direct flow rights and the common shortages to full allocation indicate that there is a need for additional diversions under the Division 5 absolute and conditional water rights.”⁴¹

Communities in the Lower Arkansas River Basin have an urgent need for additional clean water. Historically, these communities have used groundwater to supply most of their drinking water.⁴² However, more and more towns are finding that their groundwater contains cancer-causing radioactive contaminants, such as naturally occurring radium and uranium.⁴³ Fourteen water providers in the Lower Arkansas River Basin using groundwater have been placed under enforcement action by the Colorado Department of Health and Environment (CDPHE) over the last several years because levels of these contaminants violated primary drinking water standards.⁴⁴ These providers have been ordered to install expensive treatment technology or to find a better-quality water source. Additionally, total dissolved solids in the Lower Arkansas River Basin groundwater, although not a public health threat, cause taste and odor issues and burden residents with higher maintenance and replacement costs when using water-based appliances such as dishwashers and water heaters.⁴⁵ For example, the useful life of a water heater is typically about 10 years, but can be lower if the water contains dissolved solids that are above the U.S Environmental Protection Agency (EPA) recommended level of 500

³⁹ Southeastern Colorado Water Conservancy District, Allocation Principles, Findings, Determinations, and Resolutions, as amended November 29, 1979, and confirmed by the Judgment and Decree, *In the Matter of Southeastern Colorado Water Conservancy District*, District Court, Pueblo County, Case No. C.A. 40487 (December 18, 1979).

⁴⁰ See Southeastern Colorado Water Conservancy District, 2010-2014 Water Conservation and Management Plan, (2010-2014 Water Conservation and Management Plan) at 7.

⁴¹ Preliminary Engineering Report dated November 14, 2018 Case No. 2018CW3063 at 29.

⁴² AVC EIS at I-9.

⁴³ *Id.* at I-10.

⁴⁴ *Id.* at I-11 through I-12; see, e.g., Colorado Department of Public Health and Environment, Water Quality Control Division, Enforcement Order, Number DW.02.17.145030, Beehive Water Association, Otero County, Colorado, February 21, 2017.

⁴⁵ AVC EIS at I-10, 4-154 through 4-155.

milligrams per liter (mg/L).⁴⁶ The level of total dissolved solids in Lower Arkansas River Basin groundwater is typically much higher, with a median concentration of 3,400 mg/L.⁴⁷ Lower Basin water providers have worked for years with CDPHE to resolve water quality challenges and are committed to finding an alternative water supply as part of a long-term solution. Simply replacing contaminated groundwater supplies with surface water from the Arkansas River is problematic because the river is also contaminated with high levels of total dissolved solids, selenium, sulfate, uranium, and manganese.⁴⁸ Additionally, water providers need to reliably manage and deliver new water supplies.

To meet these needs, Reclamation and Southeastern have proposed three federal actions to deliver supplemental water to communities in the Lower Arkansas River Basin: (1) building the Arkansas Valley Conduit (AVC), which was originally proposed as part of the Project; (2) allowing water providers to use a pipeline connecting the Pueblo Dam north and south outlet works (Interconnect); and (3) allowing use of available storage space (excess capacity) in Pueblo Reservoir (Master Contract) when the reservoir is not filled to capacity with Project Water.⁴⁹ These proposed actions would deliver high quality water to water providers that meets EPA and state water quality requirements and recommendations, and would help water providers throughout the Arkansas River Basin reliably meet existing and future water demands. Southeastern has already executed a Master Contract with Reclamation for excess capacity storage,⁵⁰ and continues to work with Reclamation toward completion of the Interconnect and the AVC.

2. Projected population growth within the District's boundaries will result in an increased demand for water that the Conditional Rights can be used to satisfy.

Southeastern has analyzed population growth and water demand through 2040-2070 in several recent studies.⁵¹ Southeastern estimated that there would be a 55% increase in the total

⁴⁶ S.H. Widder and M.C. Baechler, Impacts of Water Quality on Residential Water Heating Equipment, prepared for the U.S. Department of Energy, PNNL-22921, November 2013 at 2.6, 2.12 – 2.13.

⁴⁷ AVC EIS at I-13 through I-14.

⁴⁸ *Id.* at I-10 and 2-26.

⁴⁹ *Id.* at I-1; Regional Water Conservation Plan at 12-13.

⁵⁰ Contract No. 16XX650031, between Southeastern Colorado Water Conservancy District and United States of America, December 23, 2016.

⁵¹ Supplement to the Regional Water Conservation Plan, prepared for the Southeastern Colorado Water Conservancy District, September 2015, 7-14 (2015 Supplement to the Regional Water Conservation Plan); Regional Water Conservation Plan, prepared for the Southeastern Colorado Water Conservancy District, February 2013, 4-7 (Regional Water Conservation Plan); 2010-2014 Water Conservation and Management Plan, 2; Arkansas Valley Conduit and Long-Term Excess Capacity Master Contract Final Environmental Impact Statement, prepared by

population within the Arkansas River Basin (to 1.3 million around 2040)⁵², and a 40% increase in population in the Lower Arkansas River Valley (Bent, Crowley, Kiowa, Otero, and Pueblo counties) by 2030-2070.⁵³ Due to this population growth, an increase in municipal water demand of 98,000 acre feet by 2030 is expected in the Arkansas River Basin.⁵⁴ Project Water diverted and stored under the Conditional Rights in high-runoff years can be carried over in East Slope storage to meet demands in later years.⁵⁵ Even assuming Southeastern diverts the full authorized Project yield and stores the maximum amount of water when it is legally and physically available, and carries over stored water to meet later demands, these Conditional Rights likely would not fully satisfy the increased demand every year.

C. Southeastern Can and Will Develop the Conditional Rights as Necessary to Realize the Project's Authorized Yield.

Southeastern will continue to work in coordination with Reclamation pursuant to its federal contract to develop and use the Conditional Rights by diverting water that is available in priority and by allocating Project Water for decreed Project purposes within Southeastern's boundaries. Southeastern plans to continue to pursue developing its fully authorized yield from the West Slope, which includes developing its remaining conditional rights to the extent needed to meet this objective.

1. Water is legally and physically available.

The attached report from Wilson Water Group (WWG) shows water availability at existing and unbuilt structures.⁵⁶ WWG has analyzed a range of possible changes to determine how to maximize development of the Conditional Rights for unbuilt structures, in order to determine how to maximize realization of the Project's authorized yield.⁵⁷ WWG concluded that

United States Department of the Interior, Bureau of Reclamation, August 2013, I-4 (AVC EIS); Southern Delivery System Final Environmental Impact Statement Summary, United States Department of the Interior, Bureau of Reclamation, December 2008, 2 – 4 (SDS EIS).

⁵² 2010-2014 Water Conservation and Management Plan at 2-3.

⁵³ Regional Water Conservation Plan at 7; 2015 Supplement to the Regional Water Conservation Plan at 6-7; AVC EIS at I-15.

⁵⁴ 2010-2014 Water Conservation and Management Plan at 2-3.

⁵⁵ Finding and Decree, *In the Matter of Adjudication of Priorities to the Right to the Use of Water for Irrigation and Nonirrigation Purposes in Water District #14, Water Division #2*, District Court, Pueblo County, Case No. B-42135 (June 25, 1962); Finding and Decree, *In the Matter of Adjudication of Priorities of the Right to the Use of Water for Irrigation and Non-Irrigation Purposes in Water District No. 11, Water Division No. 2, in the State of Colorado*, District Court, Chaffee County, C.A. 5141 (July 9, 1969).

⁵⁶ Preliminary Engineering Report, dated November 14, 2018, Case No. 2018CW3063, at 21-25 and 29.

⁵⁷ *Id.* at 25-27.

there is physically and legally available water under each of the conditional water rights at locations without existing diversion structures to divert all or a substantial portion of the full decreed conditional water rights, and that diligence should continue for the next six years.⁵⁸

2. It will be feasible for Southeastern and Reclamation to realize the Project's authorized yield and place the Conditional Rights to beneficial use.

WWG has studied feasibility at length, at a cost to the District of approximately \$85,000 for this study and related engineering and analysis to support the 18CW3063 application. WWG found that “historical diversions have fallen short of the authorized Project yield,” but that existing Project facilities could meet the authorized average annual yield of 69,200 acre-feet/year with optimal operations.⁵⁹ WWG determined there are feasible opportunities to develop the conditional water rights, including new tunnels and pump stations and new reservoir storage, should such development prove necessary to realize the authorized yield.⁶⁰ WWG also opined that it is reasonable for Reclamation and Southeastern to continue to optimize operations to increase Project yield before building new facilities.⁶¹

Based on WWG's recommendations, Southeastern has determined to continue investigating how to increase Project yield, while obtaining a finding of reasonable diligence to hold the conditional water rights for another six years. This determination shows reasonable diligence in the development of the Project's integrated water system to achieve the authorized yield of the Project. Reading the “can and will” statute together with the diligence statutes, including the “integrated system” provision in C.R.S. § 37-92-301(4)(B),⁶² this also satisfies the “can and will” requirement in the context of Southeastern's water rights for the Project.

Placing the Conditional Rights decreed to existing structures to beneficial use is economically feasible because Southeastern is repaying Project costs on schedule, consistent with its Repayment Contract. The Repayment Contract specifies terms of payment for constructing Project Facilities. Diverting and using additional amounts of water, when the Conditional Rights are made absolute, is consistent with the Repayment Contract and Project operations. Southeastern and Reclamation continue to evaluate ways of improving operations to enable Southeastern to capture additional water when it is available. As Reclamation has improved operations and access to facilities earlier in the runoff, historical diversions have

⁵⁸ *Id.*

⁵⁹ *Id.* at 29.

⁶⁰ *Id.*

⁶¹ Preliminary Engineering Report dated November 14, 2018, Case No. 18CW3063 at 29.

⁶² *See OXY*, 990 P.2d at 707.

increased significantly.⁶³ Even though the Colorado River basin has been in drought conditions since the early 2000s, the average annual project diversions through Boustead Tunnel for the period 2002 through 2017 have increased by 17 percent over the diversions from 1985 through 2001 – indicating that more efficient Project operations have increased Project yield by a significant amount.⁶⁴ 2002 through 2017 average annual diversions increased by 3 percent over the period 1985 through 2001, even when the three years during which diversions were limited due to east slope storage are excluded (1987, 1988, 1996).⁶⁵ WWG's study concluded that with optimal operations, the water rights associated with the existing Project facilities likely could provide the 69,200 acre-feet of average annual yield as projected in the Project authorization and concluded in the Reclamation 1975 Final Environmental Statement.⁶⁶

Accordingly, Southeastern is continuing to assess the feasibility of maximizing the Project yield to authorized levels through existing facilities. If this alternative should prove insufficient to realize the Project's full authorized yield, Southeastern will further assess the feasibility of either (1) moving its conditional water rights to locations outside of the Holy Cross Wilderness Area, or (2) requesting further continuation of the Conditional Rights for development as decreed.⁶⁷

3. Southeastern has or likely could have access to structures necessary to place the Conditional Rights to beneficial use, and Southeastern may show its ability to obtain necessary permits for construction.

Southeastern has a contract with Reclamation whereby Reclamation owns, has the right to access, and operates the existing structures in the Project to supply Project Water for Southeastern.⁶⁸ Construction of certain conditionally decreed Project structures has been held in abeyance pending actual operation of the Project for a sufficient period of time to determine whether or not construction of these features will become necessary. Six of the unbuilt structures are decreed for locations within, or facilities that would cross, the Holy Cross Wilderness Area.

⁶³ Preliminary Engineering Report dated November 14, 2018 Case No. 18CW3063 at 21.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 21 & 29.

⁶⁷ Discussion on this point is ongoing with the United States. Southeastern plans to continue assessing the feasibility of both options, including continuation of the rights as decreed, until the appropriate time comes to apply for a change of the Conditional Rights to new locations. *See Stipulation of Applicant with the United States dated April 27, 2011, Concerning the Application of the Southeastern Colorado Water Conservancy District for Finding of Reasonable Diligence on Conditional Water Rights of the Fryingpan-Arkansas Project in Eagle and Pitkin Counties*, District Court, Water Division 5, Case No. 09CW40 (May 28, 2012) at ¶ 5.

⁶⁸ *See Contract Between the United States and the Southeastern Colorado Water Conservancy District*, Contract No. 14-06-700-4715, January 21, 1965 at 6.

In the previous diligence case for these Division 5 conditional rights, Case No. 09CW40, the United States Forest Service asserted that, because these locations are in a wilderness area, only the President has authority to authorize development of these structures and that Southeastern could not meet the can and will test.⁶⁹ This issue was not resolved in Case No. 09CW40, and the Forest Service has raised similar assertions by its statement of opposition in this case. As a compromise to settle Case No. 09CW40, the United States and Southeastern stipulated that Southeastern would undertake a study of this issue, including alternatives for realizing the authorized yield of the Project, and would decide how to proceed by the deadline for its next diligence application (May 2018).⁷⁰ That evaluation remains underway, and (as discussed above) has involved substantial study since the previous diligence decree in 2012, fulfilling the study requirement of the 2011 stipulation with the United States.⁷¹ As explained in WWG's attached report, Southeastern's efforts to fully develop the authorized Project yield may or may not require construction of additional facilities, depending on whether new improvements to operation of existing facilities are sufficient to reach that objective.

In the event additional facilities are required to realize the Project's authorized yield, Southeastern has a prospective ability to access any property necessary to further develop the Project and its unbuilt structures; no access or permits have been denied. Southeastern and the United States are negotiating toward a stipulation in this case, similar to the one they entered in Case No. 09CW40. We expect to receive further comments from the U.S. by the end of November, and are hopeful that this case can be resolved by stipulation similar to the settlement of the previous diligence case.

The WWG study indicates Southeastern may not need to construct any additional structures in the Wilderness Area if improvements to existing structures and operations allow it to capture its full authorized Western Slope diversions.⁷² Thus, Southeastern expects to have another means by which it "can and will" obtain the full authorized yield of its absolute and conditional rights, if those efforts succeed. Southeastern desires to complete the implementation and evaluation of these efforts before any final determination whether obtaining approval to construct facilities in the Wilderness Area will be necessary.

⁶⁹ See Stipulation of Applicant with the United States dated April 27, 2011, *Concerning the Application of the Southeastern Colorado Water Conservancy District for Finding of Reasonable Diligence on Conditional Water Rights of the Fryingpan-Arkansas Project in Eagle and Pitkin Counties, Colorado*, District Court, Water Division 5, Case No. 09CW40 (May 28, 2012) at ¶ 3.

⁷⁰ *Id.* at ¶ 5.A and ¶ 5.B.

⁷¹ See Preliminary Engineering Report dated November 14, 2018, Case No. 18CW3063 at 30.

⁷² See *Id.* at 29.

4. Southeastern has a specific plan to develop the Conditional Rights within a reasonable amount of time.

The District and Reclamation plan to continue operating and maintaining the Project to fully utilize the West Slope Collection System to the extent allowed by the Project Operating Principles and the District's decreed water rights. This will include diverting the remaining conditional portion of rights decreed to existing structures, when sufficient water is available.⁷³ Southeastern plans to defer development of new structures based on potential for reaching the full authorized yield from better operation of existing structures.⁷⁴ Southeastern recognizes that feasible development may ultimately require changes to the decreed diversion points for some of the Conditional Rights. However, it would be premature to file an application for such changes until sufficient operating experience with optimized operations provides a basis to conclude whether the Project's authorized yield can be achieved without constructing additional diversions. The District intends to continue the conditional rights pending resolution of the remaining uncertainty whether full yield can be achieved otherwise.⁷⁵

Respectfully,

*Original signature is on file
at BURNS, FIGA & WILL, P.C.*

/s/ Stephen H. Leonhardt

Stephen H. Leonhardt

SHL/JCH

cc: Lee E. Miller, Esq., SECWCD
Erin Wilson, P.E.
James DuBois, Esq. (served by Colorado Courts E-Filing)
Alan Martellaro, Division Engineer (served by Colorado Courts E-Filing)

⁷³ Resolution No. 2018-02D, A Resolution of the Board of Directors of the Southeastern Colorado Water Conservancy District Concerning Diligence to Maintain and Pursue Developing Southeastern's Conditional Water Rights for the Fryingpan-Arkansas Project West Slope Collection System Facilities, April 19, 2018.

⁷⁴ Preliminary Engineering Report dated November 14, 2018, Case No. 18CW3063 at 29.

⁷⁵ *Id.* at 23-24.